

**United States Department of Labor  
Employee's Compensation Appeals Board**

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**R.E., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Decatur, GA, Employer**

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**Docket No. 06-1177  
Issued: October 4, 2006**

*Appearances:*

*R.E., pro se*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge

DAVID S. GERSON, Judge

JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On April 17, 2006 appellant filed a timely appeal of the August 29, 2005 merit decision of the Office of Workers' Compensation Programs which found that appellant had no more than a 50 percent permanent impairment of the right lower extremity for which she received a schedule award. She also appealed a January 19, 2006 decision which denied a merit review of her claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

**ISSUES**

The issues are: (1) whether the Office properly determined that appellant had no more than a 50 percent permanent impairment of the right leg for which she received a schedule award; and (2) whether the Office properly denied appellant's request for reconsideration.

**FACTUAL HISTORY**

On August 9, 2001 appellant, then a 60-year-old clerk, filed a claim alleging that on August 8, 2001 she tripped on a rug and fell on her right knee while at work. The Office accepted appellant's claim for lumbar strain, right medial meniscus tear, right osteoarthritis and

authorized arthroscopic surgery and a right total knee replacement. Appellant stopped work on August 9, 2001 and returned to a light-duty position on August 18, 2001. She retired on January 3, 2003. Appropriate compensation benefits were paid.

Appellant was treated by Dr. Thomas W. Comstock, a Board-certified orthopedist, who noted on August 8, 2001 that appellant presented with right hip pain, arm pain and wrist pain after tripping on a floor mat at work. He diagnosed muscle contusion secondary to fall. On August 21, 2001 Dr. Comstock noted appellant's complaints of right knee pain. Appellant came under the treatment of Dr. George C. Lambros, Jr., an osteopath, who treated appellant from September 18, 2001 to March 5, 2002 for a right knee injury sustained at work on August 8, 2001. Dr. Lambros noted that a magnetic resonance imaging (MRI) scan of the right knee dated August 30, 2001 revealed a torn medial meniscus, Baker's cyst and degenerative joint disease of the right knee. In an operative report dated October 8, 2001, he performed a chondroplasty of the medial femoral condyle, partial medial meniscectomy, partial synovectomy, removal of multiple small loose cartilaginous bodies and intra-articular cortisone injection of the right knee joint. Dr. Lambros diagnosed torn medial meniscus of the right knee and osteoarthritis of the right knee. He noted in reports dated October 18, 2001 to March 5, 2002 that appellant experienced persistent right knee pain due to the articular cartilage damage and recommended a total right knee replacement. In an operative report dated March 8, 2002, Dr. Lambros performed a primary hybrid right total knee replacement and diagnosed advanced tricompartmental osteoarthritis of the right knee. On August 26, 2002 he returned appellant to work light duty subject to restrictions. In a prescription note dated November 7, 2002, Dr. Lambros advised that appellant sustained a 20 percent whole person impairment or a 50 percent impairment of the right lower extremity.

On August 21, 2002 the employing establishment offered appellant a limited-duty assignment as a modified mail processing clerk. Appellant returned to full-time duty, eight hours per day, on October 15, 2002.

On December 3, 2002 appellant filed a claim for a schedule award.

In a report dated December 19, 2002, an Office medical adviser determined that appellant sustained a 37 percent permanent impairment of the right lower extremity.

In a November 6, 2003 decision, the Office found that appellant's work as a modified mail processing clerk fairly and reasonably represented his wage-earning capacity.

In a letter dated November 6, 2003, the Office requested that appellant provide a report from her treating physician with regard to her permanent impairment of the right lower extremity in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*<sup>1</sup> (A.M.A., *Guides*).

Appellant submitted reports from Dr. Lambros dated July 18, 2003 to February 16, 2004 regarding appellant's complaints of low back pain.

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<sup>1</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

On March 5, 2004 an Office medical adviser indicated more information was needed from the treating physician.

In a letter dated March 16, 2004, the Office requested that Dr. Lambros provide gradation findings with regard to appellant's total knee replacement in accordance with Table 17-35 of the A.M.A., *Guides*.

In a report dated April 6, 2004, Dr. Lambros indicated that appellant reached maximum medical improvement. He opined that, in accordance with the fifth edition of the A.M.A., *Guides*,<sup>2</sup> appellant had 50 percent impairment of the right leg. Dr. Lambros noted that based on Table 17-35 of the A.M.A., *Guides* appellant obtained fair results from the right total knee replacement, specifically noting 40 points for pain, 20 points for range of motion, 25 points for stability and subtracting 2 points for flexion contracture, 5 points for extension lag and 3 points for alignment, for a total of 75 points.<sup>3</sup> Under Table 17-33 of the A.M.A., *Guides*, for a total knee replacement including uniconylar replacement, the total of 75 points indicated a fair result (50 to 84 points) which equated to 50 percent permanent impairment of the right leg.<sup>4</sup>

In an April 15, 2004 report, the Office medical adviser concurred in Dr. Lambros' finding that appellant sustained a 50 percent permanent impairment of the right leg in accordance with Table 17-35 of the A.M.A., *Guides*.

In a decision dated April 23, 2004, the Office granted appellant a schedule award for 50 percent permanent impairment of the right lower extremity. The schedule award was granted for the period November 7, 2002 to August 10, 2005.

On August 21, 2005 appellant filed a claim for an additional schedule award. She submitted a report from Dr. David G. Hollifield, a Board-certified orthopedist to whom appellant was referred by Dr. Lambros, dated August 9, 2005, who noted a history of injury and diagnosed right total knee replacement with probable patella femoral syndrome, gait abnormality secondary to mild extension contracture and lumbar strain. Dr. Hollifield stated that appellant had been at maximum medical improvement since March 2002. He opined that in accordance with Table 17-33, page 547 of the A.M.A., *Guides* appellant sustained a 50 percent impairment of the right lower extremity due to fair results with a total knee replacement.

In a decision dated August 29, 2005, the Office denied appellant's claim for an additional schedule award on the basis that the medical evidence did not support an increase in impairment over that which was already granted.

In a letter dated December 15, 2005, appellant requested reconsideration of the Office decision dated August 29, 2005 and indicated that she experienced pain and back problems as a direct result of her knee surgery. In support of her claim, appellant submitted a report from Dr. John P. Kelley, an osteopath, dated November 14, 2005, who opined that in accordance with

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<sup>2</sup> *Id.*

<sup>3</sup> *See id.* at 549, Table 17-35.

<sup>4</sup> *See id.* at 546-47, Table 17-33.

Tables 17-33 and 17-35, page 547 to 549 of the A.M.A., *Guides* appellant had 50 percent impairment of the right leg due to fair results with a total knee replacement.

By decision dated January 19, 2006, the Office denied appellant's reconsideration request on the grounds that her request neither raised substantive legal questions nor included new and relevant evidence and was therefore insufficient to warrant review of the prior decision.

### **LEGAL PRECEDENT -- ISSUE 1**

The schedule award provision of the Federal Employees' Compensation Act<sup>5</sup> and its implementing regulation<sup>6</sup> sets forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing regulations.<sup>7</sup> As neither the Act nor its regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole, no claimant is entitled to such a schedule award.<sup>8</sup> The Board notes that section 8109(19) specifically excludes the back from the definition of "organ."<sup>9</sup> However, a claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the neck, shoulders or spine.<sup>10</sup>

### **ANALYSIS -- ISSUE 1**

Appellant asserts that she is entitled to an award greater than the 50 percent permanent impairment of the right leg for her back and right knee condition. The Office accepted appellant's claim for lumbar strain, right medial meniscus tear, right osteoarthritis and authorized arthroscopic surgery and a right total knee replacement. However, as noted above, the Act does not permit a schedule award based on impairment to the back or spine. Appellant may only be awarded a schedule award for impairment to the upper or lower extremities due to her accepted back condition.

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<sup>5</sup> 5 U.S.C. § 8107.

<sup>6</sup> 20 C.F.R. § 10.404 (1999).

<sup>7</sup> *Thomas J. Engelhart*, 50 ECAB 319 (1999).

<sup>8</sup> *See Jay K. Tomokiyo*, 51 ECAB 361 (2000).

<sup>9</sup> 5 U.S.C. § 8109(c).

<sup>10</sup> *Thomas J. Engelhart*, *supra* note 7.

In his report dated April 6, 2004, Dr. Lambros opined that appellant sustained a total of 50 percent impairment of the right lower extremity based on fair results from a right total knee replacement. He noted that based on Table 17-35 of the A.M.A., *Guides* appellant obtained fair results from the right total knee replacement, specifically noting, 40 points for pain, 20 points for range of motion, 25 points for stability and subtracting 2 points for flexion contracture, 5 points for extension lag and 3 points for alignment, for a total of 75 points.<sup>11</sup> Table 17-33 of the A.M.A., *Guides* provides that for a total knee replacement including uniconylar replacement the range of 50 to 84 points is indicative of fair results. Appellant's rating for knee replacement resulted in a total of 75 points or a 50 percent permanent impairment of the right lower extremity.<sup>12</sup>

The Office medical adviser properly applied the A.M.A., *Guides* to the information provided in Dr. Lambros' report and reached an impairment rating of 50 percent of the right lower extremity in accordance with Table 17-35 of the A.M.A., *Guides*. He noted that appellant's total knee replacement resulted in 75 points per Table 17-35 of the A.M.A., *Guides* and this would equal a fair result with a 50 percent permanent impairment of the right lower extremity per Table 17-33 of the A.M.A., *Guides*. This evaluation conforms to the A.M.A., *Guides* and establishes that appellant has no more than a 50 percent impairment of the right lower extremity.

The Board notes that appellant also submitted a report from Dr. Hollifield dated August 9, 2005, who noted appellant's right knee and back symptoms and opined that in accordance with Tables 17-33 and 17-35, page 547 to 549 of the A.M.A., *Guides* appellant sustained an 50 percent impairment of the right lower extremity due to fair results with a total knee replacement. Appellant did not submit any medical evidence supporting an award greater than 50 percent permanent impairment of the right lower extremity.

The Office properly noted that appellant was previously granted a schedule award for 50 percent permanent impairment of the right lower extremity therefore she was not entitled to an additional schedule award for the right lower extremity.

On appeal, appellant asserts that the amount of the schedule award is insufficient as she can no longer work. However, the Board has held that the amount payable pursuant to a schedule award does not take into account the effect that the impairment has on employment opportunities, wage-earning capacity, sports, hobbies or other lifestyle activities.<sup>13</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Under section 8128(a) of the Act,<sup>14</sup> the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines

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<sup>11</sup> See A.M.A., *Guides*, Table 17-35 at 549 (5<sup>th</sup> ed. 2001).

<sup>12</sup> See *supra* note 1 at 546-47, Table 17-33.

<sup>13</sup> *Ruben Franco*, 54 ECAB 496 (2003).

<sup>14</sup> 5 U.S.C. § 8128(a).

set forth in section 10.606(b)(2) of the implementing federal regulations,<sup>15</sup> which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

“(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or

“(ii) Advances a relevant legal argument not previously considered by the [Office]; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office].”

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.<sup>16</sup>

### **ANALYSIS -- ISSUE 2**

Appellant’s December 15, 2005 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office.

Appellant’s request for reconsideration asserted that she experienced severe back pain as a direct result of her knee surgery and believed this information should be taken into consideration in evaluating her claim. However, appellant’s letter does not address how the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office which had previously considered appellant’s complaints of back pain in relation to appellant’s claim for an additional schedule award and appellant did not set forth a particular point of law or fact that the Office had not considered or establish that the Office had erroneously interpreted a point of law. Furthermore, to the extent that appellant claims a schedule award for impairment to the back, the Board finds that this argument is not relevant because, as noted above, no schedule award is payable for loss of use of the back. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, appellant submitted a new report from Dr. Kelley dated November 14, 2005. Dr. Kelley opined that in accordance with Tables 17-33 and 17-35, page 547 to 549 of the A.M.A., *Guides* appellant sustained an 50 percent impairment of the right lower extremity due to fair results with a total knee replacement. However, this report is not relevant because it does not support that appellant has greater than a 50 percent permanent

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<sup>15</sup> 20 C.F.R. § 10.606(b).

<sup>16</sup> 20 C.F.R. § 10.608(b).

impairment previously granted and because the doctor used the same tables in the A.M.A., *Guides* as did previous physicians in determining this degree of impairment. Therefore, the Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

Appellant did not show that the Office erroneously applied or interpreted a point of law; she did not advance a point of law or fact not previously considered by the Office; and she did not submit relevant and pertinent evidence not previously considered by the Office.<sup>17</sup>

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2), and properly denied her December 15, 2005 request for reconsideration.

### **CONCLUSION**

The Board finds that the Office properly determined that appellant had no more than a 50 percent permanent impairment of the right leg for which she received a schedule award. The Board further finds that the Office properly denied appellant's request for reconsideration.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the January 9, 2006 and August 29, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 4, 2006  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>17</sup> 20 C.F.R. § 10.606(b).